No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1940

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, PETITIONERS

v.

EDGE R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Bituminous Coal Division, of the Department of the Interior, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-case on September 26, 1940, reversing and setting aside an order of the Director of the Division denying a petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard

Air Line Railway Company, for exemption from the regulatory provisions of the Bituminous Coal Act of 1937.

OPINIONS BELOW

The findings, conclusions, and opinion of the Director of the Bituminous Coal Division may be found at R. 1–32.[1] The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 114 F. (2d) 752.

JURISDICTION

The decree of the United States Circuit Court of Appeals sought to be reviewed was entered on September 26, 1940. The jurisdiction of this Court is invoked under Sections 239 and 240 of the Judicial Code, as amended, and Sections 4–A and 6 (b) of the Bituminous Coal Act of 1937.

QUESTIONS PRESENTED

1. Whether coal consumed by a person who leases mineral rights to coal lands and simultaneously, in a related agreement, contracts with a coal producer to mine the coal, the latter assuming, and indemnifying the consumer against, all the liabilities, burdens, and risks attendant upon the coal-mining business, is "consumed by the producer"

[1] The typewritten transcript of the entire record is on file with the Clerk of this Court. The parties have stipulated that for purposes of this petition only the Appendix to petitioner's brief in the court below and the proceedings below need be printed.

within the meaning of the exemption contained in Section 4 II (1) of the Bituminous Coal Act of 1937.

2. Whether the Director's finding that coal produced under the above circumstances is not exempt from the Act is supported by substantial evidence.

3. Whether the court below erred in treating the issue as to whether respondents were producers of coal as a matter of law, and in failing to give any weight to the Director's ultimate finding of fact that respondents were not producers.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72–91, U. S. C. Supp. V, Title 15, secs. 828–851. The provisions of the Act primarily involved are:

> SEC. 4 II (1). The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.
>
> SEC. 17. As used in this Act—
>
> * * * * *
>
> (c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

STATEMENT

Pursuant to Section 4–A of the Bituminous Coal Act of 1937 respondents, the Receivers for the Seaboard Air Line Railway Company, applied to the

Director of the Bituminous Coal Division of the Department of the Interior for exemption from the regulatory provisions of the Act for themselves and for certain coal from three mines which they claimed that they operated, on the ground that the coal was "consumed by the producer" within the meaning of Section 4 II (1) (R. 33–38).

The facts are fully set forth in the Director's findings and opinion (R. 1–32). Since the facts as to each of the three mines are substantially the same it will be necessary to describe here only the circumstances relating to one of them—the Chilton Block No. 1 Mine.

In July 1935 the Chilton Block Coal Company was the lessee of a tract of coal land in West Virginia, known as the Chilton Block No. 1 Mine (R. 15). The president of the Company was Daniel H. Pritchard (R. 20). On July 5, 1935, the Chilton Block Company offered to grant respondents, in return for a royalty of 10 cents per ton, the right to extract coal from the mine, conditional on acceptance by respondents of an offer simultaneously made by Pritchard to mine the coal and deliver it to respondents for a specified compensation[2] (R.

[2] The original contracts and leases for the William-Ann and Glamorgan mines, the other two mines here involved, were made in May and July 1934 (R. 3, 5, 11, 12), when N. R. A. code prices were in effect. The original contract and lease for the Chilton Block mine were made in July 1935, after the invalidation of the National Industrial Recovery Act, but while the bill which became the Bitumi-

15–17). The company offered to grant to Pritchard, apparently without compensation, the right to use all of its equipment and machinery in performance of the mining operations. The offer to sublease the mineral rights provided that the lease should terminate simultaneously with the agreement with Pritchard (R. 16).[4]

Pritchard's offer to mine the coal was in turn conditional upon acquisition by respondents of the mineral rights (R. 17). He offered to mine the coal either on a cost-plus basis or at a fixed price of $1.15 per ton, subject to modification in case of

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nous Coal Conservation Act of 1935 (H. R. 8429, 74th Cong., 1st Sess.) was pending in Congress. During the entire period in which the contracts were made and renewed, price-fixing legislation has either been in effect or pending in Congress.

There was an express finding that the lease and contract for the William-Ann mine, upon which the contracts for the other mines were modeled, were entered into in order to enable respondents to purchase below N. R. A. code prices (R. 11). The William-Ann lease and contract were extended for periods of three weeks or less when the *Carter Coal* decision was pending and also while new price legislation was pending in Congress, so that respondents could decide whether to renew them (R. 5).

[4] The contract to operate the William-Ann mine was also made with Pritchard, who owned stock in the mine; the mine was then being operated by his brother (R. 11). Pritchard had leased the William-Ann mining property himself for a long term, to begin on the expiration of the lease to respondents (R. 11). The lease of the Glamorgan mine was from Glamorgan Coal Lands Corporation; the contract to mine was originally made with Glamorgan Coals, Inc., and then transferred to Peerless Coal Corporation (R. 11–15).

fluctuation in the cost of materials, wages, or taxes (R. 17, 56, 68–70). Pritchard was to deliver coal, on cars at the mine, in the amounts respondents ordered (R. 21–22). He was to acquire at his own expense the mining machinery and equipment (R. 17). An agreement was to be made embodying, in addition to the above, principal terms and conditions which may be summarized as follows:[4]

> (a) The contractor (Pritchard) is to provide all the labor, materials and supplies and perform all the work necessary to the mining of the coal (R. 6).
>
> (b) The contractor will at his own expense maintain and *manage* such organization as is necessary to the performance of the contract (R. 6).
>
> (c) The contractor will assume and perform all of the obligations of the respondents to the landowner except the payment of royalties (R. 7).[5]
>
> (d) The contractor will maintain, at his sole expense, all necessary kinds of insurance on the property (R. 8).
>
> (e) The contractor will bear, and indemnify respondents against, all risks incident to the work to be performed, in-

[4] The offer provided that the agreement should embody the same terms and conditions as were contained in an agreement previously entered into between respondents and Pritchard to operate the William-Ann Mine (R. 17).

[5] The contract made for the William-Ann Mine provided that respondents were to pay taxes on the land (R. 7), but the lease for the Chilton Block Mine expressly provided that the contractors were to pay such taxes (R. 16).

cluding particularly losses for injury to persons and property, taxes on the mine and its equipment, fines, penalties, liens, claims of other liability, and attorneys' fees (R. 8-10).

(f) Respondents may terminate the contract at any time that they are able to purchase coal on the open market at a price lower than the amount to be paid the contractor plus the royalties to the lessor, unless the contractor reduces the amount he is to receive so as to enable the respondents to buy at the market price (R. 20).

(g) The coal may be inspected at the mine by respondents' inspectors, and respondents are required to pay only for coal of the requisite quality and grade (R. 49).

(h) All the coal produced is to be consumed by respondents except a small portion sold to the contractor's employees (R. 21).

(i) The agreement specifically provides that (R. 63):

> "The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence or omissions of the Contract, his agents, servants, employees or representatives."

The offers made by the Chilton Block Company and Pritchard were accepted by respondents on July 9, 1935 (R. 16, 18). The original agreements

were to run for a year with option to renew, and with minor modifications the agreements have been continued in effect since that time (R. 18–19).

In the operations under the contract, the respondents advise the contractor periodically as to how much coal is desired and the contractor loads the coal into cars and orders the cars shipped to any point respondents request (R. 21–22). Invoices are submitted to respondents and payments made to the lessor and contractor on a monthly basis (R. 23, 59–60). The shipments from the mines to points of destination are generally made across state lines (R. 23).

On the basis of the above facts (similar findings being made as to the other mines), the Director found that respondents were not the producers of the coal mined from the three leased properties (R. 24), and that the contractual arrangements "were intended as a flexible contrivance by means of which the Receivers hoped to establish themselves as nominal producers of the coal consumed by them and thereby escape the price provisions of coal legislation, including the Act." His opinion states (R. 29):

> * * * The transaction has the aspects of an ordinary commercial sale and, indeed, it appears that Applicants stand in a position not materially different from that of any large consumer who dominates a small source of supply or who has contracted for the total product of a given manufacturing

> enterprise or tract of land. In every real sense, with respect to the supply of coal obtained from these contractors, Applicants have not become a "producer" but have rather left their "consumer" position and mobility unchanged. This mobility is demonstrated quite pointedly by the contract provisions permitting Applicants to terminate the contract if they can obtain coal in the open market at a lower price than under the present arrangement, provided that the contractors do not reduce their compensation sufficient to meet the market price. The leases are terminable upon termination of the contracts.

He concluded that the transactions in coal covered by the application for exemption are subject to the regulatory provisions of the Act and that the exemption sought should be denied."

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* The Circuit Court of Appeals, overlooking the fact that respondents had applied for exemption for the coal produced and the "transactions and commerce in said coal" (R. 38), as well as for themselves personally, thought it "anomalous" for the Division to hold that respondents were not a producer for purposes of exemption, and yet still subject to the Act. But Sections 4 II (1) and 4–A provide only for the exemption of "coal" and "commerce in coal," not of producers personally, and it is clear from the Director's opinion that he held only the "transactions" in the coal involved to be subject to the Act, not the respondents (R. 32). The Director's position, as set forth in the brief below (p. 23), was and is "that petitioners are not the 'producer' of the coal for any purpose of the Act, whether it be the taxing, pricing, or other provisions."

Respondents filed a petition to review in the Circuit Court of Appeals for the Fourth Circuit. That court reversed the Director's decision, holding that it was unsupported by substantial evidence and based upon error in law.

SPECIFICATION OF ERRORS TO BE USED

The court below erred:

1. In holding that the Director's order denying exemption is based upon error of law and is not supported by substantial evidence;

2. In holding that respondents are the "producer" of the coal in question and that such coal is exempt under Section 4 II (1) of the Bituminous Coal Act of 1937;

3. In holding that the issue whether petitioners are producers within the meaning of the exemption provision in Section 4 II (1) of the Act presents a question of law for the court to decide for itself, and in failing to give any weight to the Director's determination that respondents are not the "producer" of the coal.

REASONS FOR GRANTING THE WRIT

I

The case is important to the administration of the Bituminous Coal Act because the decision below approves a device through which any large consumer can purchase coal at prices below those established under the Act.

The contracts involved here were all entered into and renewed during a period when federal minimum price regulations were in effect or when legislation to reestablish such regulation was pending (*supra*, pp. 4–5). In order to escape from such regulation (R. 5, 11, 24–25), respondents arranged to pay 9 or 10 cents a ton royalty, under a contract of lease, to the owner of the land or mineral rights, and the remainder of the price of the coal to a mine operator engaged under a contract as an independent contractor. Respondents were to exercise no more control over the operations of the mine than would any large consumer. They merely told the contractor-producer how much coal to produce and where to send it, inspected it for quality, and paid an amount specified by contract. The contractor assumed all the risks of the enterprise;[7] respondents could reject coal which did not meet their specifications; and the lease as well as the contract to operate the mine could be terminated whenever respondents could purchase coal more cheaply elsewhere. This method of acquir-

[7] The contractor even assumed all of respondents' obligations to the landowner except for the payment of royalties, and, as to one of the three mines, the payment of taxes on the land.

Respondents assert that they bear certain risks inasmuch as the amount paid the contractor fluctuates with the cost of materials, labor, and taxes. Since similar provisions are frequently contained in ordinary contracts of sale, the assumption of "risk" to this extent does not distinguish respondents from ordinary purchasers.

ing coal differs from the usual practice only in that the purchaser pays the royalty to the landowner directly instead of indirectly through the mine operator.

Clearly this arrangement differs only in form, and not in substance, from the ordinary purchase of coal. It can be availed of by any producing company with counsel astute enough to shuffle royalty and mining contracts so as to make one corporation, or corporate official, the party to a lease of the coal rights, and an affiliated corporation, or different official, a party to the contract to mine the coal. If the decision below is not reversed, any consumer large enough to purchase the entire output of a mine will be able, without assuming any of the additional responsibilities or burdens incident to entry into the coal mining business, to procure coal at prices lower than those established under the Act. Such a result would, of course, be inconsistent with the underlying purpose of Congress to establish an effective means of discouraging competitive abuses in the industry. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395.

The language of the Act permits of no such construction. Section 4 II (1) exempts coal "consumed by the producer". "Producer" is defined in Section 17 (c) as including all individuals, corporations, etc., "engaged in the business of mining coal." The facts outlined above demonstrate that not respondents but the independent contractors

here are engaged in the business of mining coal.[8] Respondents are not producers unless any owner of property who permits an independent contractor to perform work and services on his property is himself to be regarded as engaged in the same business as the contractor. But a landowner who engages a contractor to build a house on his land is not from that fact alone engaged in the building business.[9]

The court below rejected the argument that "producer" in the statute meant only the contractor "engaged in the business of mining coal" on the theory that the maxim *qui facit per alium, facit per se* made the act of the contractor the act of respondents. That familiar maxim is intended to

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[8] It is the Government's position that the contractors, not respondents, are the "producers" subject to the Act. The royalty paid directly to the lessors would, however, be a part of the price paid for the coal for purposes of compliance with the minimum price orders.

[9] The *Restatement of the Law of Agency* (American Law Institute), Section 2, Comment b, p. 13, declares:

> * * * Thus, one who contracts for a stipulated price to build a house for another who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control as to his conduct.

See, also, *H. M. Rowe Co.* v. *Tax Commission*, 149 Md. 251, 261, 131 Atl. 509, 512-513; *People* v. *Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155, affirmed, 143 U. S. 305; *Commonwealth* v. *Williamsport Rail Company*, 250 Pa. 596, 95 Atl. 795; *People ex rel. Jewellers Circular Pub. Co.* v. *Roberts*, 155 N. Y. 1, 49 N. E. 248.

describe the relation of principal and agent or master and servant. A contractor is an agent only if acting in a fiduciary capacity and subject to the control of the principal in matters of some detail.[9] But the contract in the instant case, expressly and designedly, negatives the existence of any such relationship or liability. Respondents, indemnified against all liability, only give directions as to the end to be achieved, not as to the means by which that end is accomplished.[10] The relationship between the parties is obviously not fiduciary. Under these circumstances the acts of the contractor are not the acts of respondents, and respondents are not engaged in the business of mining coal.

The court below also held that the Act was intended to apply only to sales and transfers of title, and that, since there was no formal sale here, the

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[9] *Restatement of the Law of Agency*, Sections 2 (and Comment), 220; Mechem, *Agency*, Sections 40, 1870–1871; 2 C. J. S., 1027–1028; *Casement* v. *Brown*, 148 U. S. 615, 622; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 221–222; *Chicago, Rock Island & Pacific Ry. Co.* v. *Bond*, 240 U. S. 449; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520–521.

[10] Mechem, *Agency* (2d ed., 1914), Section 40, states that an agent is "to be distinguished from the 'independent contractor,' who is one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it."

Act could not be operative. But the Act is not limited to sales. It expressly applies to coal "sold or delivered" (Section 4 II (e)). Code membership may be revoked if coal is "sold or otherwise disposed of" in violation of the code. Similar expressions showing that the Act is not restricted in its scope to technical sales are found throughout the statute.[12] In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 393, this Court noted that the regulatory provisions of the Act are applicable to "sales or *transactions*" in or affecting interstate commerce. Presumably the word "sale" was supplemented by more general language in order to prevent evasion of the Act by just such devices as are here employed.[13]

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[12] Section 1 ("regulation of the sale *and distribution*"); Section 3 (a) ("sale or other disposal"); Section 3 (b) ("sale or other disposal," "disposed of by sale," "disposed of otherwise than by sale," "sale or disposal"); Section 3 (d) ("disposed of otherwise than by sale"); Section 4 ("the code * * * shall be applicable only to *matters and transactions* in or directly affecting interstate commerce"); Section 4 II (e) ("sold or delivered or offered for sale"); Section 4–A ("transactions in coal," "sold, delivered or offered for sale"); Section 5 (b) ("sold or otherwise disposed of," "if disposed of otherwise than by sale," "sale or other disposal"); Section 5 (c) ("if disposed of otherwise than by sale," "sold or disposed of").

[13] See *Dayton Brass Castings Co.* v. *Gilligan*, 267 Fed. 872, 877–878 (S. D. Ohio), affirmed, 277 Fed. 227 (C. C. A. 6th), certiorari denied, 258 U. S. 619. Cf. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 463; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 605.

The court below assumed the existence of a general congressional intention to exclude *all* "captive" mines from the operation of the Act, and also that the mines in question are captive mines. In support of this assumed congressional intention, the court quoted testimony of the Chairman of the former Coal Commission before a Senate committee, indicating his opinion that the bill then under consideration did not embrace captive coal within its pricing provisions.[14] Captive coal is a general term which is not found in the 1937 Coal Act, although it was defined in the earlier bill before the Senate committee and in the 1935 Act.[15]

The court below assumed that there could be no price upon which the Act could operate if there were no sale. But the Act can apply to the consideration paid the contractor and lessor, regardless of what is called.

[14] The hearings quoted by the court below related to an earlier draft of the bill which contained neither Section 4 II (d) itself nor any similar provision. They were held in June, 1936, in connection with S. 4668, 74th Cong., 2d Sess., which was substantially the same, in so far as provision relevant here are concerned, as the Bituminous Coal Conservation Act of 1935, invalidated the previous month, *Carter* v. *Carter Coal Co.*, 298 U. S. 238. This bill failed to pass the 74th Congress. Bills on the same subject, though slightly changed, were introduced in the 75th Congress (S. 1, H. R. 4985). Section 4 II (d) first appeared in H. R. 4985, 75th Cong. See H. Rept. 294, 75th Cong., 1st Sess., p. 6.

[15] The Bituminous Coal Conservation Act of 1935 did contain a definition of "captive" coal, but this was not for purposes of exemption, but in order to provide a basis for determining the amount of tax payable under Section 3 of that Act (49 Stat. 1008, Section 19). That definition would not have included the present arrangement.

Section 4 II (1) itself, is the only manifestation of a legislative intention to exempt any captive coal from the 1937 Act, and its legislative history demonstrates clearly that it was not designed to apply to all captive situations.[16] That section applies only to coal consumed by the producer,[17] as defined in the Act, and as we have shown, *supra*, pp. 12 *et seq.*, respondent's coal does not come within that category.

II

The court below exercised its own independent judgment as to whether or not respondents were a "producer" within the meaning of the Act, without giving any weight to the Director's findings and decision. This treatment of the question presented as one of law for the court to determine without reference to the administrative decision conflicts in principle with the decisions of this Court in *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, and *South Chicago Coal & Dock Co.*

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[16] The 1935 Act defined captive mines as including coal produced by "a subsidiary or affiliate" (49 Stat. 1008). An amendment, which would have extended Section 4 II (1) to such relationships, passed the Senate (81 Cong. Rec. 3136), but was eliminated from the Coal Act of 1937 in conference (H. Rept. 578, 75th Cong., 1st Sess., pp. 1, 8).

[17] Where the same person is both producer and consumer, regulation of transactions (whether or not "sales") between "them" would be both impossible and meaningless. Section 4 II (1) was intended to cover that type of situation, and there is no indication in legislative history that it had any broader purpose.

v. *Bassett*, 309 U. S. 251. See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 400.

In this case, as in the *Shields* and *South Chicago* cases, there was no dispute as to the primary facts. The issue in the *Shields* case was whether on undisputed facts a railroad was an "interurban" within the meaning of the Railway Labor Act, and in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act. Here the question is whether a person is a "producer" within the meaning of the Bituminous Coal Act. In the *Shields* case this Court declared that the "determination" as to whether the carrier was an interurban "was one of fact" (305 U. S., at 181). In the *South Chicago* case the Court concluded that whether an employee was a member of a crew was not "a question of law" (309 U. S., at 258). And in the *Rochester Telephone* case the Court declared that whether one company obtained "control" of another within the meaning of the Communications Act presented "an issue of fact" (307 U. S., at 145).

In each of the cases cited it was recognized, whatever might be the classification of comparable issues as between judge and jury, that the question of ultimate fact as to whether a person came within particular statutory language was a matter of judgment on which the decision of the adminis-

trative official was to be accepted, if supported by evidence in the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review. This Court has already indicated that this principle applies to proceedings for exemptions under the Bituminous Coal Act, and that view was adopted by the Circuit Court of Appeals for the Eighth Circuit, in the *Sunshine Anthracite* litigation.[18] In its opinion in the *Sunshine* case this Court, citing the *Shields* case, referred to "the determination of the *question of fact* whether a particular coal producer fell within the Act" (310 U. S., at 400). (Italics supplied.)

It is apparent from the opinion below that the Circuit Court of Appeals in this case, regarding the issue presented as one of law,[19] failed to give the slightest weight to the decision of the Director. The court completely disregarded the principle that "The judicial function is exhausted when there is found to be a rational basis for the con-

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[18] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, 105 F. (2d) 559, certiorari denied, 308 U. S. 604.

[19] The court below also stated that the Director's finding was "not supported by substantial evidence." It is clear from the statement at the beginning of the opinion that "there is no question as to the facts of the case," as well as from the entire discussion, that this was merely a formal finding, and that the court, regarding the issue as one of law, gave no weight to the Director's conclusion and judgment.

clusions approved by the administrative body." *Rochester Tel. Corp.* v. *United States, supra*, at 146; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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NOVEMBER 1940.